JULY 26, 2018 | DISCRIMINATION, HARASSMENT & RETALIATION

Mitigating Risk for Rogue Employee Speech

Generally, employers can be held vicariously liable for the tortious conduct of an employee committed within the scope of his or her employment. This often arises in the context of negligence cases, such as automobile and workplace accidents. However, employers can also be held liable for defamatory statements made by their employees when those statements are made within the scope of their employment. Therefore, it is important to mitigate this risk through effective policies and procedures and employee training.

Employers do not need to police employee communications around the clock. However, employers can and should provide clear policies about employee conduct in the workplace and appropriate use of social media to mitigate the risk of being held responsible for an employee's misconduct. Employer concerns about employees making potentially defamatory statements were slightly curtailed in the Fourth Circuit's recent decision on June 11, 2018 in *Sade Garnett v. Remedi Seniorcare of Virginia, LLC*, No. 17-1890 (June 11, 2018). However, that holding certainly does not completely relieve employers from liability for rogue employee statements.

The Fourth Circuit's decision provided further clarification as to when an employer can be held vicariously liable for an employee's defamatory statements and, more specifically, when an employee is acting within the scope of their employment. The plaintiff in that case sued her employer for defamation based on crude sexual comments that her supervisor made about the reasons she was out of work for surgery. The plaintiff claimed that because the comments were *made at work*, the employer should be held liable.

Ultimately, the Fourth Circuit rejected this theory of liability holding that although the supervisor's alleged defamatory statements were made at work, they were nonetheless outside the scope of employment. The Court explained that it would be impossible for an employer to police its employees' speech and prevent such misconduct. The Court emphasized that "[l]iability will attach only if the employer (a) bears at least partial responsibility for the tortious conduct; or (b) has some ability to limit the likelihood that the employee would commit a tort."

The Court relied on the Restatement (Third) of Agency Law which limits vicarious liability to situations in which the employee was either (a) performing work assigned by the employer; or (b) engaging in a course of conduct subject to the employer's control. Employers are not liable when an employee acts independently or in a manner that does not serve any goal of the employer. The Court held that "[i]n other words, there must be a nexus between the employee's workplace responsibilities and the offensive act."

Thus, the court's decision did not relieve employers of all liability for alleged defamatory statements made by

rogue employees. Employers can still be held liable for an employee's conduct when the employer orders or endorses that conduct or where it occurs in the execution of an employee's professional duties. The Court provided specific examples of cases where employers were held liable because an employee facilitated a tort or crime through their position and the employer's business, such as a bank teller using his position to facilitate a forgery scheme (i.e., *Gina Chin & Assocs., Inc. v. First Union Bank*, 260 Va. 533, 542 (2000)), or a psychologist engaging in sexual intercourse with a patient (i.e., *Plummer v. Ctr. Psychiatrists, Ltd.*, 252 Va. 233, 237 (1996)).

There is no single mechanical test to determine when an employee is engaged in activities that fall within the scope of employment, but case law has yielded various formulations which are instructive. Generally, an employer can be held liable for an employee's defamatory statements if they are made at the direction of the employer, made in the interest of the employer, made during the discharge of a duty for the employer, or if the employee acts under the express or implied authority of the employer. For example, in contrast to the facts and holding in *Sade Gannet,* in *McLachlan v. Bell*, 261 F.3d 908 (9th Cir.2001), the Ninth Circuit held that employees' alleged defamatory statements about a co-worker concerning matters related to his work on aeronautical engineer projects for NASA were deemed within the scope of employment. Ultimately, because the statements about the plaintiff took place in the workplace and were *related* to business activities, the court denied the defendants' motion for summary judgment and found that the employer could be held liable.

Workplace disputes and personal issues between co-workers often result in negative communications which – depending on the circumstances – could lead to defamation claims against the employer. The context in which a defamation claim may arise varies widely from statements made during investigations, disciplinary meetings, and reference checks to simple interoffice communications between employees. Given the rise in the number of defamation claims, employers should implement clear policies about how employees are expected to behave, including policies addressing Standards of Conduct, Business Ethics, and employee communications and statements on Social Media. Effectively communicating clear expectations about employees' responsibilities, conduct, and the workplace will help mitigate the risk of defamation liability, though employers should also ensure these policies are conveyed and implemented in a manner that does not impact employees' Section 7 rights under the National Labor Relations Act. If an employer knows or has reason to know that an employee is not abiding by those policies, it should take immediate action regardless of whether the employee's statements are considered defamatory under applicable state common law principles.